IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID LANE JOHNSON, Plaintiff/Movant, vs. NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, ET AL., Defendants/Respondents.	)	Case No. 5:17-cv-00047 Judge Sara Lioi

DEFENDANT NFLPA'S SUPPLEMENTAL MEMORANDUM IN FURTHER SUPPORT OF ITS OPPOSITION TO PLAINTIFF'S MOTION TO VACATE ARBITRATION AWARD

INTRODUCTION

Pursuant to the Court's February 16, 2017 Order (Doc. No. 42), the National Football League Players Association ("NFLPA") hereby supplements its Memorandum in Support of its Opposition to Plaintiff's Motion to Vacate an Arbitration Award ("Opposition") (Doc. No. 33) to address the purportedly new allegations set forth in Plaintiff's First Amended Complaint ("FAC") (Doc. No. 39) relating to Plaintiff David Lane Johnson's ("Plaintiff" or "Johnson") Motion to Vacate an Arbitration Award under the Federal Arbitration Act (Doc. No. 3).

In relevant part, Johnson's FAC makes the purportedly new allegations that: (1) the NFL retained the WilmerHale firm for several matters, including the Ray Rice investigation (FAC ¶¶ 180-82, Doc. No. 39 at 1758); (2) Arbitrator Carter was aware of these "non-trivial dealings" between WilmerHale and the NFL, but "failed to disclose" this "material relationship" to Johnson and "to conduct an appropriate conflicts check prior to agreeing to preside over Johnson's appeal" (*id.* ¶¶ 195-96, 198-99, Doc. No. 39 at 1760; *see also id.* ¶¶ 235-36, Doc. No.

39 at 1764-65); (3) Johnson "did not waive conflicts Carter improperly failed to disclose" (*id.* ¶ 237, Doc. No. 39 at 1765); (4) Carter "concealed his improper appointment" under the Policy on Performance-Enhancing Substances ("PES Policy") "by denying Johnson discovery concerning the arbitrator selection process itself" (*id.* ¶ 238, Doc. No. 39 at 1765); and (5) the NFLPA failed to disclose to Johnson that Carter was assigned to hear appeals under both the PES Policy and the Policy and Program on Substances of Abuse ("SOA Policy") (*id.* ¶¶ 327-28, Doc. No. 39 at 1776). As shown below, all of these purported new allegations are based on information that was either disclosed to Johnson or publicly available and discoverable by Johnson prior to the arbitration hearing with due diligence. Thus, like Johnson's other allegations, the additional averments (i) do not provide any basis to challenge the selection or service of Arbitrator Carter and (ii) have been waived.

ARGUMENT

As detailed in the Opposition, Arbitrator Carter's affiliation with WilmerHale was expressly disclosed to Johnson prior to the arbitration, and WilmerHale's role in the Ray Rice investigation was, as conceded by Johnson, "high-profile" and thus also known or easily knowable to Johnson before the arbitration. Opp'n, Doc. No. 33 at 1337-38, 1344-45; Opp'n, Ex. E, Email from H. McPhee to D. Vance, *et al.* (Sept. 20, 2016), Doc. No. 33-5 at 1404 ("Also, as mentioned on our call, there are two arbitrators, Professor Wong and James Carter, who is Of Counsel at Wilmer Hale. Mr. Carter is based in NYC, so should be convenient for in-person."). Further, it is undisputed that Carter had nothing to do with the Ray Rice investigation conducted by WilmerHale.

Unable to plead around these facts, Johnson now alleges that there were "other matters" for which the NFL retained WilmerHale. FAC ¶ 181, Doc. No. 39 at 1758. But tellingly, Johnson

fails to identify even one such "other matter[]"; rather he still only lists the Ray Rice investigation. *Id.* ¶¶ 181-82, Doc. No. 39 at 1758. Further, Johnson still does not (because he cannot) allege that Carter himself worked on, or had any involvement with, any such "other matter[]" for WilmerHale. Allegations that unidentified members of WilmerHale's 1,000+ lawyer firm *other than Carter* worked for the NFL on unidentified "other matters" concerning unidentified subjects is hardly sufficient to meet Johnson's burden to prove *Arbitrator Carter's* evident partiality. Johnson cannot obtain vacatur based on empty allegations of unspecified bias and no evidence.

Moreover, as the factual record demonstrates, Johnson was also well aware that there were only two arbitrators appointed under the PES Policy—Arbitrators Carter and Wong—at the time of Johnson's appeal because the NFLPA expressly told him so on two separate occasions. Opp'n, Ex. E, Email from H. McPhee to D. Vance, *et al.* (Sept. 20, 2016), Doc. No. 33-5 at 1404. Carter could thus not have "concealed his improper appointment" from Johnson. FAC ¶ 238, Doc. No. 39 at 1765.

With respect to Carter's simultaneous service as an arbitrator under the PES and SOA Policies, Johnson's argument that this rendered Carter evidently partial is baseless too. *See* Opp'n, Doc. No. 33 at 1345-47. There is no plausible reason proffered by Johnson as to why Carter's service as an arbitrator under both policies, as opposed to one of the policies, would cause Arbitrator Carter to be evidently partial. That said, Johnson has come forward with no evidence that he was unaware of Carter's dual status as an arbitrator under the PES and SOA Policies. To the contrary, this was another publicly available fact about which Johnson should have been aware. *See, e.g.*, Curriculum Vitae of Arbitrator James Carter, *available at* http://www.tas-cas.org/uploads/tx_tascas/CV_Carter_Sep2016.pdf (listing his position as

"Appeals Arbitrator for Policy and Program on Substance Abuse and Policy on Performance-Enhancing Substances, 2015-present").

The bottom line is that all of Johnson's purportedly new (and original) allegations about Arbitrator Carter's evident partiality are meritless. They are also waived. Recognizing this dispositive failure to object to Carter serving as the arbitrator at the hearing, Johnson now claims that he "questioned the arbitrator selection provisions in the 2015 Policy" "[t]hroughout the entirety of the proceedings" because he "objected to Carter's service as the arbitrator in the discovery hearing [on September 22, 2016] and incorporated that objection during the appeal hearing." FAC ¶ 325, Doc. No. 39 at 1775; *see also id.* ¶ 16(w), Doc. No. 39 at 1731.

But what Johnson's counsel actually said during the discovery hearing was that while he "questioned the arbitrator selection provisions" (*id.* ¶ 325, Doc. No. 39 at 1775), Johnson had "*no objection to [Arbitrator Carter's] qualifications.*" Mot. to Vacate Arb. Award, Ex. 6, Disc. Hr'g Tr. ("Disc. Hr'g Tr.") 6:2-10, Doc. No. 3-7 at 346 (emphasis added). (This shows that Johnson investigated Carter's qualifications and background before the arbitration and could and should have known about, *e.g.*, Arbitrator Carter's dual service under the PES and SOA Policies and WilmerHale's work in the Ray Rice matter.) After the discovery hearing, Johnson never again raised any concerns about, or objection to, the identity, selection or number of arbitrators; nor did he raise any objection to Arbitrator Carter's alleged "conflicts" or "improper appointment" in his Basis of Appeal or during the arbitration hearing.

What Johnson characterizes as his objecting "[t]hroughout the entirety of the proceedings" (FAC ¶ 325, Doc. No. 39 at 1775) merely refers to his perfunctory statement at the arbitration that he "wish[ed] to incorporate, by reference, [his] initial submissions in this case, including the discovery call . . ." (Mot. to Vacate Arb. Award, Ex. 9, Arb. Tr. 159:12-14, Doc.

No. 3-10 at 532). Such a statement does not constitute a "continuous[]" "objection" to "Carter's service as the arbitrator" (FAC ¶¶ 16(w), 325, Doc. No. 39 at 1731, 1775), especially since there was no specific objection made to Arbitrator Carter himself for any alleged evident partiality or other reason during the discovery call—if anything, it would be a reaffirmation of Johnson's prior statement that he had "no objection to [Arbitrator Carter's] qualifications" (Disc. Hr'g Tr. 6:2-10, Doc. No. 3-7 at 346).

There is a long practice under the NFL-NFLPA Collective Bargaining Agreement ("CBA") of arbitral parties bringing recusal motions and making crystal clear their objections to arbitrator service if they believe there is a valid objection to such service to present. *See, e.g.*, Recusal Motion to P. Tagliabue in the "Bounty" Arbitration (Oct. 24, 2012), attached hereto as Ex. A; Recusal Motion to R. Goodell in the Ray Rice Arbitration (Sept. 15, 2014), attached hereto as Ex. B; Recusal Motion to H. Henderson in the Adrian Peterson Arbitration (Nov. 25, 2014), attached hereto as Ex. C; Recusal Motion to H. Henderson in the Greg Hardy Arbitration (May 11, 2015), attached hereto as Ex. D; Recusal Motion to R. Goodell in the Tom Brady Arbitration (May 19, 2015), attached hereto as Ex. E. Here, in contrast, Johnson indicated that he had no objection to Carter's qualifications, and he made no claim of evident partiality.

Johnson made a choice not to seek Arbitrator Carter's recusal until after the adverse Award was handed down. Indeed, as described in the NFLPA's Opposition, Johnson effectively had a choice between Arbitrator Wong (who was originally scheduled but unavailable in person in New York on the hearing date) and Arbitrator Carter, and Johnson preferred to proceed in person before Arbitrator Carter. Opp'n, Doc. No. 33 at 1338-41. Black letter law prohibits *post hoc* objections to an arbitrator by the losing party following an award because such gamesmanship deprives the arbitrator of the ability to consider any recusal motion in the first

instance, before the outcome of the arbitration is determined. *See Detroit Newspaper Agency v. Newspaper Drivers & Handlers, Teamsters Local No. 372*, 45 F.3d 430, at *1 (6th Cir. 1994) (holding that plaintiff "waived its right to argue that the arbitrator exceeded his authority" because "[o]ne who fails to object promptly to procedural errors made at an arbitration hearing waives the right to later assert those errors"); *Early v. E. Transfer*, 699 F.2d 552, 558 (1st Cir. 1983) (parties to arbitration cannot "seek victory before the tribunal and then, having lost, seek to overturn it for bias never before claimed" because courts "will not entertain a claim of personal bias where it could have been but was not raised at the hearing to which it applies"); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 674 (5th Cir. 2002), *opinion modified on reh'g* (July 9, 2002) (holding that plaintiff's "failure to object at the hearing constitutes a waiver" and noting that "[t]he failure to file a clear written objection to a defect in the selection process constitutes waiver").[1]

In sum, prior to the arbitration, Johnson knew or would have known with diligence about all of the arguments he now advances in his FAC for disqualifying Arbitrator Carter. But he chose not to raise any objection to Arbitrator Carter's purported evident partiality or the arbitration selection process until after Arbitrator Carter issued his unfavorable Award. By doing so, Johnson waived any such objections.

[1] Johnson's allegation that Carter "failed to disclose" the "conflicts" resulting from the "material relationship" between WilmerHale and the NFL *to Johnson* (FAC ¶¶ 195-96, 198-99, 237, Doc. No. 39 at 1760, 1765) is another red herring. As described above, all of the alleged conflicts were known or knowable to Johnson with due diligence. And Johnson has no right to select arbitrators—the NFL-NFLPA CBA and the 2015 PES Policy provide that the NFL/NFLMC and NFLPA choose the arbitrators—so the relevant issue would be whether Arbitrator Carter failed to disclose these purported "conflicts" to the NFLPA, not to Johnson. There is no allegation or evidence that Arbitrator Carter failed to do so. Arbitrator Carter is eminently qualified and fair, and the NFLPA had no concerns that other WilmerHale attorneys' prior work on the Rice investigation (or any "other" claimed NFL matter) would taint Arbitrator Carter. It is the NFLPA's judgment, not Johnson's *post hoc* objections, that matters under the CBA and the PES Policy.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the NFLPA's Opposition, Johnson's Motion to Vacate an Arbitration Award should be denied.

Dated: February 27, 2017

Respectfully submitted,

/s/ Thomas D. Warren
Jeffrey L. Kessler (*pro hac vice*)
David L. Greenspan (*pro hac vice*)
Jonathan Amoona (*pro hac vice*)
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-4698
Facsimile: (212) 294-4700
Email: JKessler@winston.com
Email: DGreenspan@winston.com
Email: JAmoona@winston.com

Thomas D. Warren
Baker & Hostetler LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114-1214
Telephone: (216) 621-0200
Facsimile: (216) 696-0740
Email: TWarren@bakerlaw.com

Ann Yackshaw
Baker & Hostetler LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260
Telephone: (614) 228-1541
Facsimile: (614) 462-2616
Email: AYackshaw@bakerlaw.com

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

Pursuant to Local Rule 7.1(f), the undersigned certifies that as of the date of filing, February 27, 2017, this case has not yet been assigned to a track and further certifies that the foregoing memorandum adheres to the page limitations set forth in Local Rule 7.1(f).

/s/ Thomas D. Warren

Attorney for Defendant/Respondent
National Football League Players Association

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Thomas D. Warren

Attorney for Defendant/Respondent
National Football League Players Association

EXHIBIT A

WINSTON & STRAWN LLP

BEIJING
CHARLOTTE
CHICAGO
GENEVA
HONG KONG
HOUSTON
LONDON
LOS ANGELES

200 PARK AVENUE
NEW YORK, NEW YORK 10166

+1 (212) 294-6700

FACSIMILE +1 (212) 294-4700

www.winston.com

MOSCOW
NEW YORK
NEWARK
PARIS
SAN FRANCISCO
SHANGHAI
WASHINGTON, D.C.

JEFFREY L. KESSLER
Partner
212-294-4698
jkessler@winston.com

October 24, 2012

VIA EMAIL AND FEDERAL EXPRESS

Paul Tagliabue, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

Re: Scott Fujita, Anthony Hargrove, Will Smith and Jonathan Vilma Disciplinary Appeals – Recusal Motion

Dear Commissioner Tagliabue:

I write on behalf of the NFLPA and Scott Fujita, Anthony Hargrove and Will Smith (the "Players") to formally move for your recusal as arbitrator for the Players' appeals from the discipline recently re-imposed by Commissioner Goodell. In addition, Peter Ginsberg, counsel for Jonathan Vilma, has indicated that they too join in this recusal motion.

RELEVANT FACTS

As you know, the Players have initiated court proceedings in the United States District Court for the Eastern District of Louisiana challenging, among other things, Commissioner Goodell's ability to arbitrate the Players' disciplinary appeals under controlling law (the "Federal Court proceedings").

On October 19, 2012, Commissioner Goodell recused himself. See Oct. 19, 2012 Ltr. from Roger Goodell to DeMaurice Smith (Ex. A hereto). Prior to recusing himself, the Commissioner spoke to NFLPA Executive Director DeMaurice Smith about selecting a replacement to arbitrate this matter. Mr. Smith "urged" the Commissioner "to consider appointing one of the members of the [CBA's] Appeals Panel," all of whom had recently been jointly selected by the NFL and the NFLPA. Id. at 1. Commissioner Goodell instead rejected Mr. Smith's proposal and unilaterally appointed you to arbitrate the Players' appeals on October 30, 2012. Id. at 2.[1]

There is no dispute that you currently are Senior Of Counsel at Covington & Burling LLP ("Covington").[2] It is also undisputed that Covington serves as the NFL's lead counsel in the Federal Court proceedings, in a defamation lawsuit filed by Mr. Vilma against Commissioner Goodell, and also in various CBA arbitrations concerning the Commissioner's jurisdiction. In that capacity, Covington has been defending, and continues to defend, the Commissioner's punishments, factual findings, procedures and jurisdiction under the CBA – all subjects that you have now been called upon to arbitrate. We offer some representative examples of the contested factual and legal positions that your firm is strongly advocating on behalf of the NFL in these proceedings:

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[1] Although it is irrelevant, the NFLPA feels compelled to respond to the NFL's assertion that Mr. Smith agreed "that Commissioner Tagliabue would be a 'capable and unbiased' hearing officer." Oct. 23, 2012 Ltr. from Jeffrey Pash to DeMaurice Smith at 1 (Ex. B hereto) ("Pash Letter"). In fact, as Commissioner Goodell's own letter indicates, Mr. Smith "urged" the Commissioner to appoint one of the CBA Appeals Panel members as the arbitrator. Further, Mr. Smith specifically told the Commissioner that appointing Commissioner Tagliabue would do nothing to create a sense of fairness with respect to these proceedings.

[2] See *Biographies*, COVINGTON & BURLING LLP, http://www.cov.com/ptagliabue/ (last visited on Oct. 24, 2012).

- "[A]ll of the circumstances here include the fact that [the Players] do not dispute that the Saints program offered incentives for cart-offs and knockouts, and that cart-offs and knock-outs were plays in which an opposing player was disabled or injured, at least temporarily."[3]

- There is "no merit" to the NFLPA's position that the NFL Constitution & Bylaws provisions cited by Commissioner Goodell as the exclusive basis for suspending Mr. Fujita have no application to NFL players (rather, those provisions apply exclusively to League and Club employees).[4]

- The Players have no rights under the CBA or industrial due process to materials or witnesses beyond the inadequate disclosures the NFL has made to date.[5]

- "The NFLPA's accusation that the NFL withheld 'exculpatory evidence' is baseless . . . ."[6]

- Arguing to the CBA Appeals Panel that "the agreement that is at issue here, []is an agreement by players to pay other players to injure their opponents."[7]

- Describing the underlying conduct as "incentivizing players to injure other players" and asserting that "[a] player who incentivizes other players to injure or to knock out of a game an opposing player should not escape Commissioner jurisdiction."[8]

- Arguing that "here the bad conduct for which these players were disciplined was their offer, their pledge, their payment of money to other players for a nefarious purpose."[9]

- "Mr. Vilma's failure to offer any basis for his bar [sic] assertions of 'actual malice' should not be a surprise. As the March 2 Report and the March 21 Memorandum of Decision make clear, an extensive investigation of the bounty-related allegations was conducted before the challenged statements were issued.

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[3] NFL's Response in Opp'n to Mots. to Vacate at 8 (Oct. 17, 2012) (Rec. Doc. 143) (Ex. C hereto).

[4] Id. at 12.

[5] Id. at 9-11.

[6] Mem. in Support of Defs.' Mot. to Dismiss, or, In the Alternative, for Summ. J. at 14 n.3 (July 20, 2012) (Rec. Doc. 64-1) (Ex. D hereto).

[7] Aug. 30, 2012 Appeals Panel Hr'g Tr. 138:8-12 (excerpted at Ex. E hereto.)

[8] Id. at 154:6-10, 127:11-16.

[9] May 30, 2012 System Arbitrator Hr'g Tr. 53:25-54:4 (excerpted at Ex. F hereto.)

> Those documents were issued only after a long, detailed and professional investigation was (a) conducted by NFL Security's experienced investigators and (b) reviewed and endorsed by a highly regarded outside counsel, former United States Attorney for the Southern District of New York Mary Jo White."[10]

For you to rule in favor of the Players on any of these contested issues would require you to reach conclusions of fact and law that are contrary to the positions taken by your law firm on behalf of the NFL, which, as discussed below, you have an ethical duty as a lawyer employed by Covington to support.

The significance in stature and revenue of the NFL as a Covington client is also undisputed. Covington has served as the principal outside counsel for the NFL for decades in a wide berth of litigation, arbitration and transactional matters.[11] Public documents filed by the NFL in 2011 – Form 990 (filed by organizations exempt from paying income tax) – indicate that the Management Council alone paid legal fees to Covington of approximately $3.25 million for the period April 1, 2010 through March 31, 2011; we do not know whether NFL Properties, individual NFL Clubs, or other NFL-related entities paid additional sums to Covington during the same timeframe.[12]

Moreover, your biography on Covington's website promotes the fact that you "continue[] as a business advisor to the NFL."[13] The firm's website similarly highlights that, "[f]ollowing

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[10]Mem. in Support of Def.'s Mot. to Dismiss Pursuant to Rule 12(B)(6) at 22 n.8 (July 5, 2012) (Rec. Doc. 23-1) (Ex. G hereto).

[11] See, e.g., *Practices, Industries & Regions*, COVINGTON & BURLING LLP, http://www.cov.com/industry/sports/ (last visited Oct. 24, 2012) (emphasis added).

[12] See IRS Form 990, filed by Roger Goodell on behalf of NFLMC (Mar. 30, 2012) (excerpted at Ex. H hereto).

[13] See *Biographies*, COVINGTON & BURLING LLP, http://www.cov.com/ptagliabue/ (last visited on Oct. 24, 2012).

his 17 year service with distinction as Commissioner of the NFL, Paul Tagliabue has returned to Covington as senior counsel and plays an active role in the firm's sports practice."[14] We further understand that you continue to earn income from the NFL. And, although counsel for the NFL declined to disclose any specifics, Mr. Birch confirmed that you have an ongoing "consulting relationship with the League and receive[] deferred compensation from [your] service as Commissioner."[15]

While the NFL has correctly asserted that "[e]veryone is well aware of Commissioner Tagliabue's history with the NFL," and "[e]veryone knows that Covington & Burling has done work for the NFL," the NFL has refused to disclose the particulars of your ongoing business relations with the League, including with respect to your consulting agreement.[16] The NFL has also refused to disclose its communications with you concerning this matter – such as communications relating to your agreement to take on this engagement. These failures to disclose further exacerbate the clear picture of evident partiality.[17]

Finally, as NFL Commissioner in and around the 1996 and 1997 NFL seasons, you played a central role in facts that will be a subject of the Players' arbitration appeals. You will recall that in '96-'97, NFL players – including current NFL Vice President of Player

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[14] *Practices, Industries & Regions*, COVINGTON & BURLING LLP, http://www.cov.com/industry/sports/ (last visited Oct. 24, 2012).

[15] See Oct. 23, 2012 Ltr. from Adolpho Birch to Peter Ginsberg at 1 (Ex. I hereto); see also Oct. 22, 2012 Ltr. from Peter Ginsberg to Adolpho Birch (Ex. J).

[16] Pash Ltr. at 2.

[17] In his letter, Mr. Pash states that you have not served as "outside counsel" to the League since re-joining Covington, and that you have "billed no time to the NFL since joining the Covington firm." Pash Ltr. at 2. However, Mr. Pash does not dispute that you actively serve as an advisor to the NFL and that you are apparently being compensated for such services – presumably covering your services as arbitrator – through your consulting arrangement.

Engagement, Troy Vincent – openly discussed their creation of, and participation in, the "Smash for Cash" program to incentivize "big hits" and "big plays." Your office was, at the time, quoted as saying that "the 'Smash for Cash' program is within the rules as long as players use their own monies, the amounts are not exorbitant, and the payments are not for illegal hits."[18] Thus, an important question in the Players' arbitration appeals will be how the same alleged behavior judged to be "within the rules" when you were Commissioner could now somehow constitute conduct detrimental warranting draconian punishments. Your direct role in that situation even makes you a potential witness in the arbitration appeal.[19]

ARGUMENT

An arbitration award issued by an arbitrator deemed to be "evidently partial" must be vacated. The controlling evident partiality test, which applies to all arbitrators – even a former league Commissioner selected by designation under a CBA – is whether "a reasonable person would have to conclude that [the arbitrator] was partial to one party." Householder Grp. v. Caughran, 354 F. App'x 848, 852 (5th Cir. Nov. 20, 2009). As set forth below, you cannot meet the legal requirement to be free from evident partiality for multiple reasons. Accordingly, you should recuse yourself from serving as arbitrator in this matter.

A. Your Employment At The NFL's Law Firm Handling The Very Issues That You Would Arbitrate Renders You Evidently Partial And Requires Your Recusal

As a lawyer at the law firm that currently and regularly represents the NFL in this very matter, you owe fiduciary and ethical duties to the NFL which make it impossible for you to be

[18] See DVD: Smash for Cash (ESPN NFL Countdown 1996) (Ex. K hereto).

[19] Mr. Vincent is thus also a potential witness in this matter.

viewed as anything but evidently partial in this case. See New York State Bar Ass'n v. FTC, 276 F. Supp. 2d 110, 130 (D.D.C. 2003) ("As has been repeatedly stated in judicial decisions going back two hundred years and more, a lawyer owes a client the highest fiduciary duty of loyalty.") (citing Stockton v. Ford, 52 U.S. 232, 247 (1850)); Storm Drilling Co. v. Atl. Richfield Corp., 386 F. Supp. 830, 831-32 (E.D. La. 1974) ("It is fundamental to the position of an advocate in an adversary system that his loyalty to his client be undivided. The lawyer's duty to his client is fiduciary in nature."); D.C. Rules of Prof'l Conduct, R. 1.3(a) (2007) ("A lawyer shall represent a client zealously and diligently within the bounds of the law."); see also id., R. 1.3 cmt. 6 ("In the exercise of professional judgment, a lawyer should always act in a manner consistent with the best interests of the client.").[20]

Indeed, the comments to the D.C. Rules of Professional Conduct provide that "[t]his duty requires the lawyer to pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and to take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client." Id. cmt. 1.

It is difficult to fathom, in light of your legal, professional and ethical obligations to the NFL with respect to this particular dispute, how an objective observer could conclude anything

[20] As a Covington lawyer, the firm's obligations to its client – the NFL – impute to you even if you do not personally represent the NFL in this matter. ABA MODEL CODE OF PROF'L CONDUCT R. 1.10 cmt. 2 (rev. 2009) (rules regarding conflicts of interest "give[] effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated."). Further, as Covington's website indicates, you do continue to advise the NFL. But even if you did not, your duty of loyalty to the NFL concerning the "bounty" matter would still exist.

other than that you are evidently partial to the NFL on the underlying issues. The conflict of interest and partiality in this situation is obvious. See, e.g., D.C. Bar Legal Ethics Comm., Op. 276 (1997) (where arbitrator's law firm represents a party to the mediation there is "substantial potential for adverse impact upon the interests of existing firm clients"). Courts have ruled accordingly. See, e.g., Third Nat'l Bank v. Wedge Grp. Inc., 749 F. Supp. 851, 855 (M.D. Tenn. 1990) ("Given the business connection between [designated arbitrator] and [defendant] and the resulting fiduciary duties [designated arbitrator] owes to [defendant] as the company's agent, it is reasonable to conclude that [designated arbitrator] would be partial to [defendant] in the arbitration of this dispute. . . . The Court hereby ORDERS the parties to submit to the Court within thirty (30) days the name of a mutually-acceptable arbitrator for the Court to appoint.").

As demonstrated above, for you to rule for the Players on any issue in this arbitration – e.g., the League's disputed factual allegations, the appropriate level of any punishments, the process the Players are entitled to under the CBA and labor arbitration law, questions of CBA and Constitution & Bylaws interpretation, and even this recusal motion – you will have to reverse course from positions strongly advocated by your law firm and your client in this matter. The NFLPA's recusal motion is not intended to impugn your integrity, but there simply is no conceivable way that anyone in your circumstances could be deemed free from evident partiality.

In Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972), the Second Circuit affirmed the disqualification of the Commissioner of the American Basketball Association under virtually identical circumstances: the law firm at which he was a partner was serving as counsel to one of the parties in the arbitration proceedings. 468 F.2d at 1068. The court held that "a neutral arbitrator should be substituted for the Commissioner," in order to

"insure a fair and impartial hearing." Id. at 1068 n.2; see also Schmitz v. Zilveti, 20 F.3d 1043, 1049 (9th Cir. 1994) (arbitrator was evidently partial where arbitrator's law firm had represented parent company of a party for decades). Notably, the Second Circuit reached this conclusion in Erving even though the arbitration agreement specifically designated the Commissioner as the arbitrator. Your position at Covington calls for the same result here, and, accordingly, requires that you recuse yourself from adjudicating the Players' appeals. In the event you do not recuse yourself, we will ask the Court to vacate any decision you issue on evident partiality grounds.

Additionally, as you no doubt recall, in Morris v. New York Football Giants, while you were then acting as NFL Commissioner, you were disqualified from serving as arbitrator on evident partiality grounds because of, inter alia, your previous position as "chief outside counsel for the NFL" in which you "frequently represented NFL owners in disputes with players" and had strongly advocated the very issue you were then being called upon to arbitrate. 575 N.Y.S.2d 1013, 1016 (Sup. Ct. 1991). The facts of your evident partiality in this case are even more severe: you are Senior Of Counsel in the law firm currently advocating the issues that you will be called upon to arbitrate. Accordingly, and similar to Morris, to find for the Players in this arbitration, you would have to reverse positions taken by your current law firm and by your client. See id. at 1016-17.[21] As in Erving, the Morris court reached this conclusion even though

[21] The NFL's attempt to distinguish Morris and Erving in the Pash Letter (at 3 n.1) on the ground that neither involved a CBA or the Labor Management Relations Act ("LMRA") is a non-sequitur as there is no case or authority that supports a claim that CBA arbitrators are immune from the evident partiality test. See, e.g., Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. Of Teamsters, 969 F.2d 1436, 1446 (3d Cir. 1992) (disqualifying arbitrator appointed pursuant to collective bargaining agreement for partiality to one party); Grand Rapids Die Casting Corp. v. Local Union No. 159, 684 F.2d 413 (6th Cir. 1982) (removing arbitrator in CBA arbitration because his outbursts compromised the impartiality to which the parties were entitled). The

the arbitration agreement at issue specifically named you as the arbitrator – the point being that even an agreed upon arbitrator with known relationships to one side must still pass the evident partiality test. You cannot satisfy the request here as a lawyer employed by the NFL's law firm in the very proceeding you have now been asked to arbitrate.

B. Your Substantial Business Relationships With The NFL And Covington The NFL Additionally Warrant Recusal

It is well-established that an arbitrator is also evidently partial where he "has had a direct business or professional relationship with one of the parties to the arbitration." Weber v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 455 F. Supp. 2d 545, 552 (N.D. Tex. 2006). Recusal of an arbitrator is thus necessary where the arbitrator "has a substantial interest in a firm which has done more than trivial business with a party." Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 151-152 (1968).

You have business ties to the NFL in multiple respects: the NFL is one of your law firm's most important and substantial clients; you personally continue to advise the NFL as a Covington lawyer; you apparently have a consulting contract with the NFL; and, the NFL pays you deferred income from your work as a former Commissioner. Such pervasive business relationships with a party to an arbitration have consistently been the basis for a finding of evident partiality. See, e.g., Commonwealth Coatings, 393 U.S. at 151-52; Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 159 (8th Cir. 1995) (evidently partial arbitrator was a high ranking officer in a company that did more than trivial business with party);

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relevant point of the decisions in Erving and Morris is the analogous circumstances in which the courts found sports league commissioners to be evidently partial even though they had been specifically contemplated by the parties to arbitrate those disputes.

Schmitz, 20 F.3d at 1044 (evidently partial arbitrator's law firm had represented parent company of a party for decades); Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 81 (2d Cir. 1984) (evidently partial arbitrator's father was General President of the union involved in the arbitrated dispute).

In Commonwealth Coatings, for example, the Supreme Court found evident partiality where the arbitrator received "significant" patronage – the payment of $12,000 in engineering consulting fees to him over a period of four or five years – by a prime contractor who was one of the parties to the arbitration. 393 U.S. at 146. Even though the Court found that the "relationship with the prime contractor was in a sense sporadic in that the arbitrator's services were used only from time to time at irregular intervals, and there had been no dealings between [the arbitrator and the party to the arbitration] for about a year immediately preceding the arbitration," disqualification of the arbitrator was nevertheless warranted because the "close business connections" were "more than trivial." Id. at 146, 152; see also Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 135, 139 (2d Cir. 2007) (finding evident partiality where arbitrator's business – not the arbitrator himself – stood to gain $275,000 from a relationship between his company and a party).

Here, the business relationship at issue between you, Covington and the NFL is, to say the least, more than "sporadic" and "trivial." And, although the NFL stresses that you "will receive no separate or additional compensation from the NFL for [your] service as the appeal hearing officer" (Pash Ltr. at 2), this misses the point. None of the evident partiality cases above turned upon the arbitrator profiting from one of the parties due to his service or ruling in the arbitration. Nor is the NFLPA indicting your character or accusing you of anything nefarious;

but the fact remains that courts have repeatedly held that an arbitrator cannot pass the evident partiality test where he or she has significant business relationships with one of the parties, such as yours with Covington and the NFL.

C. Your Role In The Underlying Facts Of The Arbitration Further Warrants Your Recusal

Yet another ground for recusal is your direct role in some of the underlying events to be arbitrated; indeed, you are a potential witness in the arbitration. Specifically, in connection with a recent filing in the Federal Court proceedings, the NFLPA submitted a January 1996 ESPN segment entitled "Smash for Cash," which details former NFL player-funded incentive pools for legitimate plays.[22] As the segment demonstrates, "Smash for Cash" and other player-to-player incentive programs for "big hits" and "big plays" were not only widespread throughout the NFL during your tenure as Commissioner, but were also expressly condoned by your office on multiple occasions during that time. Indeed, towards the conclusion of the "Smash for Cash" segment, an NFL spokesperson is quoted as saying that "the 'Smash for Cash' program is within the rules as long as players use their own monies, the amounts are not exorbitant, and the payments are not for illegal hits."[23]

A key issue in the Players' appeals will be how the same alleged behavior that your office declared on more than one occasion to be "within the rules" could somehow now constitute "conduct detrimental" warranting suspensions. These additional facts would alone render you

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[22] See DVD: Smash for Cash (ESPN NFL Countdown 1996).

[23] Id.; see also Tim Panaccio, Packers' Big Hits Earned Cash, Courtesy of All-pro Reggie White, PHILLY.COM, Jan. 13, 1996, http://articles.philly.com/1996-01-13/sports/25654435_1_bill-cowher-big-hits-greg-aiello (quoting current NFL spokesman Greg Aiello: "there was nothing wrong with what [incentive pool funder Reggie] White did").

evidently partial, i.e., a reasonable person would have to conclude that you are evidently partial in matters for which you played a personal role.

D. The NFL's Remaining Responses To the Players' Evident Partiality Claims Are Without Merit

First, the fact that Article 46 of the CBA grants the Commissioner discretion to designate an alternate arbitrator is besides the point. All labor arbitrators, even sports league commissioners, are subject to the requirement to be free from evident partiality. See, e.g., NHLPA v. Bettman, 1994 WL 738835, at *13 (S.D.N.Y. Nov. 9, 1994) ("[E]ven the agreed-upon appointment of an arbitrator with known links to one side of the controversy does not immunize the status or conduct of the decisionmaker from all judicial scrutiny."). As this requirement would apply to the Commissioner when he serves as an arbitrator, it necessarily applies to the Commissioner's designee.[24]

Second, as this submission makes clear, none of the Players' grounds for recusal assume your personal involvement in the investigation, arbitration or litigation of the "bounty" matter. Accordingly, the NFL's assurances that you had and have no such involvement (Pash Ltr. at 2) are immaterial to the issue of recusal, which is based on, among other things, the involvement of

[24] Indeed, the Williams cases that the NFL cites (Pash Ltr. at 3) did not find that Mr. Pash or Harold Henderson – individuals who have previously served as arbitrators designated by the Commissioner – were immune from the requirement to be free from evident partiality. Instead, those decisions involved an arguable waiver of an evident partiality objection because the grievant did not object on this ground prior to issuance of the arbitration award. See Williams v. NFL, 2012 WL 2366636, at *7-8 (D. Colo. June 21, 2012) (citing multitude of cases in which parties waived objection by ignoring possibility of bias until adverse award was issued and finding that plaintiff "was aware that Mr. Henderson was appointed . . yet did not object on the basis of bias during the proceedings") (emphasis added); see also Williams v. NFL, 582 F.3d 863, 886 (8th Cir. 2009) (finding that union "waived any objection as to Pash's evident partiality . . . by failing to object" and nevertheless proceeding to discussion of an "improper motives" evident partiality analysis).

your law firm in these very matters and the derivative ethical and fiduciary obligations this imposes upon you.

Third, the NFL similarly misses the point in emphasizing that, unlike with respect to Commissioner Goodell, you have not "expressed any views whatsoever about the pending appeals let alone anything that could be interpreted as indicating a 'prejudgment' of the issues presented in the appeals." Pash Ltr. at 2. The NFLPA does not contend that you are evidently partial as a result of any "prejudgment"; rather, the grounds for our recusal motion are those described above – e.g., your status as Senior Of Counsel at the NFL's outside law firm in this matter.

Finally, the fact that the CBA appoints an Article 46 arbitrator with some inherent biases, i.e., the Commissioner, does not mean that an Article 46 arbitrator is not subject to the evident partiality test – a point Erving, Morris, and Bettman make crystal clear. In this connection, the NFLPA is not seeking your recusal because of any inherent bias you have as a former Commissioner. Rather, your recusal is required because of, e.g., your law firm's involvement in the very issues presented by this arbitration, your business relationships with Covington and the NFL, and your personal involvement in some of the underlying facts.[25] In this vein, it is irrelevant that Mr. Pash, Harold Henderson, Bob Wallace and Jay Moyer have previously served as the Commissioner's designated arbitrator – none of them served under circumstances remotely resembling those here, e.g., while simultaneously employed as a lawyer for the law firm representing the NFL in the same matters to be arbitrated. The NFLPA has never bargained –

[25] Accordingly, the analysis in Bettman, Black v. NFLPA, 87 F. Supp. 2d 1 (D.D.C. 2000), and Mandich v. N. Star P'ship, 450 N.W.2d 173 (Minn. Ct. App. 1990), relied upon the NFL (see Pash Ltr. at 2-3) are inapposite for the simple reason that they address an "inherent bias" claim the NFLPA is not making in support of your recusal.

and would not bargain – for such an arbitrator. To the contrary, the NFLPA is entitled to an arbitrator who can pass the evident partiality test.

E. In The Alternative Of Recusal, Any Arbitration Award Should Be Stayed Pending Judicial Review

In the event that you decline to recuse yourself, then the NFLPA and the Players request that you agree that any suspensions imposed by your arbitration award not become effective for, at a minimum, a period of one week. Such a stay would enable the Court to review your award and determine whether it should be vacated on evident partiality or other grounds. In the absence of a stay, the Players' suspensions would go into effect immediately, subjecting them to severe and irreparable harm on the basis of an arbitration award that the NFLPA believes would be unlawful and subject to vacatur by the Court. We would appreciate your ruling as soon as possible on our stay request because it may impact the Court's schedule as well.

CONCLUSION

For all of the foregoing reasons, the Players respectfully request that you recuse yourself from arbitrating this matter.

Respectfully Submitted,

Jeffrey Kessler/DG

Jeffrey L. Kessler

cc: DeMaurice Smith, Esq.
Tom DePaso, Esq.
Heather McPhee, Esq.
David Greenspan, Esq.
Richard Smith, Esq.
Peter Ginsberg, Esq.
Jeff Pash, Esq.
Adolpho Birch, Esq.

Gregg Levy, Esq.
Benjamin Block, Esq.
Mary Jo White, Esq.

EXHIBIT B

1133 20th Street, NW • Washington, DC 20036 202.756.9100 tel

NFL PLAYERS ASSOCIATION

September 15, 2014

VIA E-MAIL

Commissioner Roger Goodell
National Football League
345 Park Avenue
New York, NY 10154

Re: Notice of Arbitration Appeal of Ray Rice

Dear Roger,

We are in receipt of the discipline notice you issued on September 11, 2014 imposing an "indefinite suspension" on Ray Rice, after Mr. Rice had already been suspended by you for two games for the exact same conduct, on July 23, 2014. This letter will serve as a notice of appeal on behalf of Mr. Rice for the discipline issued on September 11.

These are the facts:

- On February 15, 2014, the State of New Jersey issued a criminal complaint against Mr. Rice, which was publicly available and disseminated by the media, alleging that he committed "assault by attempting to cause bodily injury to J. Palmer, specifically by striking her with his hand, rendering her unconscious, at the Revel Casino."

- On June 16, 2014 you met with Ray Rice, Janay Palmer Rice, Mr. Rice's representatives, Ozzie Newsome and Dick Cass. During that meeting, Mr. Rice informed you of his conduct during the incident that occurred at the Revel hotel/casino in February 2014.

- On July 23, 2014 you issued a discipline letter to Mr. Rice for the February 2014 conduct. You stated in the letter that "[Mr. Rice] candidly described the events and confirmed the essential facts underlying [his] arrest," and imposed a two-game suspension on Mr. Rice that ended after the Ravens game against the Pittsburgh Steelers.

- On August 28, 2014, you stated in a letter to NFL owners that you "got it wrong" regarding the discipline of Mr. Rice, and the NFL imposed a new Domestic Violence Policy in which the discipline for a first offense is a six-game suspension.

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- On September 8, 2014, a videotape from the inside of the elevator where the incident occurred was released to the media.

- On September 8, 2014, the Ravens cut Mr. Rice, and you stated publicly that Mr. Rice is "suspended indefinitely." You claim that no one at the NFL had seen the videotape from the inside of the elevator.

- On September 10, 2014, the Associated Press reported that a law enforcement official told them he sent a DVD with a copy of the elevator video to the NFL office in April, and on April 9 he received a voice mail acknowledging the video was received.

- On September 11, 2014, you sent a letter to Mr. Rice stating that he is suspended indefinitely.

Specifically, your September 11 letter claimed that the videotape "shows a starkly different sequence of events from what [Mr. Rice] and [his] representatives stated" in the June 16 hearing and is "important new information that warrants reconsideration of the discipline imposed on [Mr. Rice] in July." The union and player disagree with this assertion and believe that there is no "new information" that was not available to or in the League and/or Club's possession prior to the original final discipline. Therefore, the second discipline has no legal basis, for reasons of double jeopardy and other grounds the player may assert.

In light of the above, the NFLPA believes that you are not able to serve as the arbitrator of this appeal under governing legal standards. The law is well-settled that additional discipline cannot be imposed when the assertedly new information on which the added discipline was based was either known or available to management. Your knowledge and actions will be a central issue in the appeal, as will the knowledge and actions of other personnel supervised by you. You and these other NFL personnel will necessarily be witnesses in this appeal.

Moreover, since all of the critical facts that undermine the appearance of a fair and impartial process occurred within the office of the Commissioner, we demand that a neutral and jointly selected arbitrator be selected to hear this case. This letter will serve

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as the formal demand for you to recuse yourself as the arbitrator of Mr. Rice's disciplinary appeal. If you do not agree to recuse yourself in the manner requested, you will leave the NFLPA no choice but to seek judicial relief to ensure a fundamentally fair and transparent appeal process.

Very truly yours,

Tom DePaso
NFLPA General Counsel

cc: DeMaurice F. Smith, Esq.
Heather McPhee, Esq.
Jeffrey L. Kessler, Esq.
Jeff Pash, Esq.
Adolpho Birch, Esq.
Gregg Levy, Esq.
Ray Rice
Todd France

EXHIBIT C

WINSTON & STRAWN LLP North America Europe Asia

200 Park Avenue
New York, NY 10166
T +1 212 294 6700
F +1 212 294 4700

JEFFREY L. KESSLER
Partner
212-294-4698
jkessler@winston.com

November 25, 2014

VIA EMAIL

Mr. Harold Henderson
President, NFL Player Care Foundation
P.O. Box 4746
New York, NY 10017

Re: Adrian Peterson Article 46 Appeal Hearing

Dear Mr. Henderson:

I write on behalf of the National Football League Players Association ("NFLPA") and Adrian Peterson to formally move for your recusal as arbitrator of Mr. Peterson's Article 46 appeal. Neither you, nor anyone else with your inextricable ties to the League Office and Commissioner Goodell, could lawfully preside over Mr. Peterson's appeal due to evident partiality. As a result, we request that you recuse yourself so that Mr. Peterson may be afforded a fundamentally fair hearing, as required by the Labor Management Relations and Federal Arbitration Acts.

The inescapable fact of your evident partiality stems from your personal and continuing professional connection to the NFL and Commissioner Goodell, who, by his actions, has publicly committed himself to an unlawful application of discipline in this matter, in an attempt to reduce the intense public pressure that has been placed on the Commissioner and the League as a result of its long-standing Policy and practices concerning discipline for acts of domestic violence.

Specifically, since the two-game suspension imposed on Ray Rice in July 2014 for an act of domestic violence against his then-fiancée, the NFL has been the target of unprecedented, withering criticism for its disciplinary treatment of incidents of player domestic violence. The unrelenting and intense public furor has led a number of interest groups, media commentators and members of Congress to call for Commissioner Goodell to resign due to his inadequate handling of this issue.

Reacting to this unprecedented public criticism directed at the Commissioner and the NFL, the Commissioner has made a number of public comments committing to do "whatever is necessary" with respect to punishing domestic violence to quell the public storm—a posture that is totally inappropriate for the arbitrator of disciplinary appeals. *Compare* Aug. 28 Ltr. from Commissioner to Owners at 1

("We allowed our standards to fall below where they should be . . . .") *with* Sept. 19, 2014 Goodell Opening Statement to Press Conf. (". . . [N]ow I will get it right and do whatever is necessary to accomplish that."). As part of this public commitment to "get it right," the Commissioner renounced the very NFL disciplinary Policy he was required to apply—*i.e.*, the Policy in place at the time Mr. Peterson committed the conduct in question—and instead imposed the NFL's "new," August 28, 2014 domestic violence Policy to Mr. Peterson on a retroactive basis.

Moreover, the Commissioner did so in apparent retaliation for Mr. Peterson's exercise of his rights as a union member in refusing to attend a "new" disciplinary hearing, involving various outside consultants, that has never been part of the collectively bargained Article 46 process. In fact, before Mr. Peterson exercised his right not to attend such an unprecedented "hearing," NFL Executive Vice President of Football Operations Troy Vincent told Mr. Peterson that the revised August 28 Policy could *not* be applied to him; rather, Mr. Peterson was subject to discipline under the prior iteration of the Policy. Similarly, during the Ray Rice arbitration, the NFL—through Commissioner Goodell's testimony and counsel's argument—made much of the fact that the Commissioner did *not* apply the August 28 Policy retroactively to Mr. Rice's conduct. *See, e.g.*, *Rice* Hr'g Tr. 101:7-13 (Goodell) ("Q. Did you give any consideration to changing Mr. Rice's discipline at [the] time [that you issued the August 28 policy]? A. I did not. Q. And why not? A. Because I gave him the discipline, I felt it was appropriate. The policy was the policy that I was changing ***going forward***.") (emphasis added).

All of these NFL statements and actions with respect to Mr. Peterson's discipline have occurred within the broader context of the public campaign in which the Commissioner has vowed to issue much harsher discipline, and impose new procedures, for domestic violence offenses. The problem with the Commissioner's zeal here is that—as he and Mr. Vincent have acknowledged—such new disciplinary policies and procedures cannot apply retroactively to Mr. Peterson's conduct prior to August 28. The Commissioner's determination to nonetheless apply the revised Policy to Mr. Peterson is clearly infected with evident partiality arising out of the NFL's apparent need to try to appease the public uproar. *See, e.g.*, Sept. 19 Goodell Opening Statement to Press Conf. ("There will be changes to our personal conduct policy. I know this will happen because we will make it happen. Nothing is off the table."). No one closely tied to the NFL, such as yourself, can serve as arbitrator in this hearing without running afoul of the evident partiality standard.

Because of this unique set of facts, unforeseeable when Article 46 was last agreed to in 2011, no individual employed by, or affiliated with, the NFL can arbitrate Mr. Peterson's appeal with the impartiality required by law. With all due respect, this applies to someone in your position, who spent 16 years as the NFL's Executive Vice President for Labor Relations and Chairman of the NFLMC's Executive Committee, subsequently became Executive Vice President for Player Development, and currently serves as President of the NFL Player Care Foundation. We further understand that you are still

employed part-time by the NFL and thus report to the Commissioner, that the NFL controls your pension, and that the NFL's financial disclosures indicate that the League has paid you more than $2.5 million over the three-year span beginning in 2009. We do not know the details of your most recent payments by the NFL, but we believe that you must disclose those as well, as they are likely to provide further support for the conclusion that you cannot satisfy the evident partiality test to serve as the arbitrator in this case.

We also note that your evident partiality is more clearly on display here because of the fact that, unlike in a typical Article 46 appeal, you will be called upon to adjudicate issues involving the credibility of both Commissioner Goodell and Mr. Vincent. This circumstance gives you a further personal connection to, and stake in, the outcome of Mr. Peterson's appeal, which is another reason to disqualify you from serving as arbitrator in this matter. See Elkouri & Elkouri, *How Arbitration Works* 2-33 (Kenneth May et al. eds., 7th ed. 2012) ("Obviously . . . disqualification is appropriate when the arbitrator has a personal stake in the outcome of the arbitration."); *id.* (citing *Pitta v. Hotel Ass'n of NYC*, 806 F.2d 419, 423-24 (2d Cir. 1986) ("It is axiomatic that a neutral decision-maker may not decide disputes in which he or she has a personal stake. . . .")).

Finally, we note that as Chair of the NFLMC for 16 years, you had direct involvement in shaping the disciplinary policies which led to the unprecedented criticism that will necessarily be part of Mr. Peterson's appeal. How those issues are treated in this hearing will reflect on your professional reputation as well, which thus establishes yet another debilitating personal stake possessed by you in the issues on appeal, in further violation of the evident partiality test.

For all of the foregoing reasons, the NFLPA and Mr. Peterson respectfully request that you recuse yourself from arbitrating this matter.

Respectfully submitted,

Jeff Kessler JSA

Jeffrey L. Kessler

cc: DeMaurice Smith
Tom DePaso
David Greenspan
Adolpho Birch
Adrian Peterson
Ben Dogra

EXHIBIT D

1133 20th Street, NW • Washington, DC 20036 202.756.9100 tel

NFL PLAYERS ASSOCIATION

May 11, 2015

VIA EMAIL

Mr. Harold Henderson
President, NFL Player Care Foundation
P.O. Box 4746
New York, NY 10017

Re: Greg Hardy Article 46 Appeal Hearing

Dear Mr. Henderson:

I write on behalf of the National Football League Players Association ("NFLPA") and Mr. Greg Hardy to formally move for your recusal as arbitrator of Mr. Hardy's Article 46 appeal. Your evident partiality disqualifies you from serving as arbitrator under the governing standards of the Labor Management Relations and Federal Arbitration Acts.

Mr. Hardy's appeal challenges the discipline because, among other things, it was retroactively applied pursuant to a personal conduct policy that was *not* in place at the time of the alleged conduct. Such retroactive discipline violates the law of the shop and the essence of the parties' CBA.

Relevant to this recusal motion, Mr. Hardy's appeal puts into question the conduct of Commissioner Goodell, with whom you have long-standing and continuing personal and financial ties. You spent 16 years as the NFL's Executive Vice President for Labor Relations and Chairman of the NFLMC's Executive Committee, subsequently became Executive Vice President for Player Development, and currently serves as President of the NFL Player Care Foundation. We further understand that you are still employed part-time by the NFL and thus report to the Commissioner, and that the NFL controls your pension.

Commissioner Goodell testified in the *Rice* arbitration that he was not permitted under the CBA to retroactively apply the new personal conduct policy:

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> [I] did call [Rice] shortly after I issued the August 28th change of personal conduct policy.... I also made it very clear that I issued this policy earlier this week ... and that it was something that I felt we needed to do to make sure we were dealing with this issue of domestic violence and sexual assault in a more responsible fashion, but it didn't impact on him, this was not something that impacted on him. He was given his discipline and we moved forward.

Tr. 101:14-102:9. Commissioner Goodell further testified that the NFL is "required to provide proper notification" of any changes in discipline (*id.* 99:21-100:15)), and that this was why "[t]he policy was the policy that [the Commissioner] was changing *going forward*." *Id.* at 101:7-102:13. As Judge Jones ruled in *Rice*: "Recognizing that even under the broad deference afforded to [the Commissioner] through Article 46, he could not retroactively apply the new presumptive penalty to Rice, the Commissioner called Rice to ensure him that his punishment would remain unchanged." *Rice* at 16.[1]

Thus, for you to rule for Mr. Hardy that the Commissioner improperly applied the new policy retroactively, you would have to find that the Commissioner contradicted his own sworn testimony in *Rice.* The CBA does not permit, and the NFLPA never agreed, that someone with your ties to the Commissioner and the NFL could arbitrate such an issue.

Moreover, U.S. District Court Judge Doty ruled that, in the case of Mr. Peterson, the Commissioner's retroactive application of the new personal conduct policy violated the essence of the CBA. *See NFLPA v. NFL* at 13-14. For you to rule

[1] As part of his commitment to "get it right" and correct his past "mistakes," the Commissioner has publicly renounced the very NFL disciplinary policy he was required to apply to Mr. Hardy—*i.e.*, the Policy in place at the time Mr. Hardy allegedly committed the conduct in question—and instead imposed the NFL's "new," August 28, 2014 personal conduct policy to Mr. Hardy on a retroactive basis.

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for Mr. Hardy on retroactivity grounds, you would have to rule that Commissioner Goodell ignored Judge Doty's order by—once again—retroactively applying the personal conduct policy. Governing standards of evident partiality and fundamental fairness prohibit someone with your ties to the Commissioner and the NFL from arbitrating such an issue.

Relatedly, we expect the NFL will take the position at the arbitration that the Commissioner did not impose discipline under the current personal conduct policy because the Commissioner's discipline letter does not expressly say so. Any such position would be absurd. Mr. Hardy's ten-game suspension could not possibly have been imposed under the policy in effect at the time of his alleged conduct; the law of the shop under *that* policy was a maximum two-game suspension for first-time offenders. But that is, or may be, an issue for another day. Relevant here, the Commissioner's credibility will be the subject of the arbitration for the additional reason that his discipline letter was designed to obfuscate the fact of his retroactive application of the personal conduct policy. You may not lawfully arbitrate this issue either.

That is not all. Judge Doty vacated your arbitration award in *Peterson* and remanded for "further proceedings before the arbitrator as permitted by the CBA." *NFLPA* at 16. Under the CBA (Article 46), players have a right to an expedited hearing and to a decision as soon as practicable. Nonetheless, the NFL—in defiance of the federal court order—urged you to make *no ruling* on Mr. Peterson's appeal, and to treat Judge Doty's order as a nullity. You complied. Indeed, rather than conducting "*further* proceedings … *permitted* by the CBA" as Judge Doty ordered, you have instead conducted *no* proceedings in *violation* of Mr. Peterson's CBA right to expedition. With all due respect, this conduct demonstrates actual bias, evident partiality, and your unfitness to serve as an arbitrator under the CBA.

Under these specific circumstances, you cannot arbitrate Mr. Hardy's appeal with the impartiality required by law.

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NFL PLAYERS
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For all of the foregoing reasons, Mr. Hardy reasonably fears that he will not receive a fair and impartial hearing as required by law and the CBA, and the NFLPA and Mr. Hardy respectfully request that you recuse yourself from arbitrating this matter.

Respectfully submitted,

Heather M. McPhee

cc: DeMaurice Smith
Tom DePaso
Jeffrey Kessler
David Greenspan
Adolpho Birch
Greg Hardy
Frank Maister
Drew Rosenhaus

EXHIBIT E

WINSTON & STRAWN LLP North America Europe Asia

200 Park Avenue
New York, NY 10166
T +1 212 294 6700
F +1 212 294 4700

JEFFREY L. KESSLER
Partner
212-294-4698
jkessler@winston.com

May 19, 2015

VIA E-MAIL

Roger Goodell
Commissioner
National Football League
345 Park Avenue
New York, NY 10154

Re: Tom Brady Disciplinary Appeal – Recusal Motion

Dear Commissioner Goodell:

I write on behalf of the National Football League Players Association ("NFLPA") and Tom Brady to move for your recusal as the arbitrator for the NFLPA and Mr. Brady's disciplinary appeal.

Neither the NFLPA nor Mr. Brady has received any response from the League regarding our request for the appointment of a neutral arbitrator. Nor have we received any formal notice of your apparent intention to arbitrate Mr. Brady's appeal. Nonetheless, media reports—with direct attribution to members of your staff—indicate that is what you intend to do.

Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141-197, and the Federal Arbitration Act ("FAA"), 9 U.S.C §§ 1-14, provide the governing standards for labor arbitrations and labor arbitrators. Those standards apply with equal force to Commissioners of professional sports leagues who wish to serve as arbitrators. *See, e.g., Nat'l Hockey League Players' Ass'n v. Bettman*, No. 93 Civ. 5769 (KMW), 1994 WL 738835, at *13 (S.D.N.Y. Nov. 9, 1994) ("[E]ven the agreed-upon appointment of an arbitrator with known

links to one side of the controversy does not immunize the status or conduct of the decisionmaker from all judicial scrutiny."). Moreover, even where, as here, the CBA provides that a Commissioner may arbitrate certain types of disputes, that does not mean he is legally fit to arbitrate *all* disputes. Rather, the circumstances of a particular arbitration may render a Commissioner "evidently partial" and thereby disqualify him from serving as the arbitrator. *See Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067, 1067 n.2 (2d Cir. 1972) (upholding the District Court's finding that a neutral arbitrator must be substituted for the ABA Commissioner since the Commissioner was a partner at the law firm representing the ABA team in the dispute); *Morris v. New York Football Giants, Inc.*, 575 N.Y.S.2d 1013, 1017 (Sup. Ct. 1991) (removing NFL Commissioner as arbitrator where plaintiffs demonstrated "evidence of lack of neutrality and 'evident partiality' and bias on the part of the Commissioner with respect to this specific matter"); *see also State ex rel. Hewitt v. Kerr*, No. SC 93846, 2015 WL 2061986 (Mo. Apr. 28, 2015) (en banc).

As set forth below, your evident partiality—on myriad grounds—requires your recusal from hearing the NFLPA and Mr. Brady's appeal. Were you to issue an arbitration award in this matter, it would be tainted by your evident partiality and subject to vacatur by a District Court.

ARGUMENT

I. You Cannot Lawfully Arbitrate Whether You Committed A CBA Violation By Delegating Exclusive Conduct Detrimental Disciplinary Powers To Troy Vincent

One of the grounds for the NFLPA and Mr. Brady's appeal is that—in direct violation of the CBA—Troy Vincent, rather than you, imposed Mr. Brady's discipline. *See* May 14, 2015 Notice of Arbitration Appeal of Tom Brady at 1-2. The CBA provides that the NFL Commissioner—and only the NFL Commissioner—has the authority to impose conduct

detrimental discipline on players. For example, Article 46 of the CBA sets forth the "exclusive" procedures for processing and arbitrating League discipline and specifically refers to "disputes . . . involving action taken against a player ***by the Commissioner*** for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows . . . ." CBA, Art. 46 § 1(a) (emphasis added). Further, the NFL Player Contract expressly provides that "*the Commissioner*"—not anyone else—"will have the right" to impose a fine or suspension or terminate the Player Contract for conduct detrimental. CBA, App. A, ¶ 15 (emphasis added).

Indeed, the League—including you personally—has repeatedly stated that the Commissioner is the only person with authority to make conduct detrimental determinations with respect to players under the CBA:

- "The Commissioner's exclusive jurisdiction to hear all disputes arising out of discipline for conduct detrimental is consistent with his ***sole authority to impose such discipline***. The NFL Constitution and Bylaws, expressly incorporated in the CBA, states that ***the Commissioner has 'complete authority' to 'decide' when a player 'has been or is guilty of conduct detrimental*** to the welfare of the League or professional football.'" *See Bounty*, Pre-Hearing Br. of the NFLMC (May 14, 2012), at 12 (quoting Const. & Bylaws, § 8.13(A)) (emphases added);

- "[T]he parties have agreed that ***the Commissioner, and only the Commissioner, may determine whether conduct by a player is detrimental to the League***." *Id.* at 13 (citing CBA, App. A, ¶ 15) (emphasis added);

- ***The Commissioner has "the 'complete authority' to discipline a player for conduct detrimental*** to the League . . . ." *See* Daniel Nash Letter to Judge Barbara Jones (Oct. 13, 2014), at 1 (quoting Const. & Bylaws, § 8.13(A)) (emphasis added);

- "It is firmly established that the CBA provides the Commissioner with '***exclusive and broad authority' to determine whether a particular player's conduct has***

been detrimental to the League and to determine the appropriate level of discipline." *Id.* at 3 (quoting *Bounty*, at 4) (emphasis added);

- "[A]s Commissioner Tagliabue noted in the Bounty proceedings, '***the Commissioner has always had sole discretion' to discipline players for conduct detrimental***." *Id.* at 4 (quoting *Bounty* Decision on Recusal, slip op. at 1-2 (Nov. 5, 2012)) (emphasis in original); and

- "[T]he parties have agreed that ***the Commissioner is the appropriate person to decide questions of discipline, both initially*** and on appeal." *See* Commissioner Roger Goodell Letter to NFLPA Executive Director DeMaurice Smith (Oct. 19, 2012), at 1 (emphasis added).

Notwithstanding these clear CBA provisions and repeated admissions by you and the NFL's counsel, the NFL now takes the position that you may delegate your exclusive conduct detrimental disciplinary authority to others—as you did by delegating to Mr. Vincent the purported authority to discipline Mr. Brady. This attempt to unilaterally rewrite the CBA mirrors one of the issues in the pending *Personal Conduct Policy* grievance that the NFLPA was forced to commence due to, among other things, your unauthorized delegation of your CBA power to impose player discipline under the new Personal Conduct Policy. In that grievance, you have directed the NFL's counsel to advocate for your purported right to delegate your disciplinary authority, further demonstrating your evident partiality on this issue. *See In re Personal Conduct Policy Grievance*, Pre-Hearing Br. of the NFL (Apr. 16, 2015), at 20-22.

Under these circumstances, you cannot possibly satisfy the governing evident partiality test to arbitrate this issue. Indeed, the circumstances here are analogous to those in *Morris*, where Commissioner Tagliabue was disqualified from serving as an arbitrator, and the court appointed a neutral arbitrator in his place. *See* 575 N.Y.S.2d 1013. In *Morris*, the court found that Commissioner Tagliabue's advocacy to the Solicitor General's Office of the same legal

position he was supposed to arbitrate demonstrated "evident partiality" on that subject. *Id.* at 1016. Lobbying the government on a legal position important to the NFL may have been part of Mr. Tagliabue's job as NFL Commissioner, but it still disqualified him from arbitrating that issue because "[t]o find for plaintiffs herein, the Commissioner would have to reverse certain positions he previously strongly advocated . . . ." *Id.* at 1016-17. You have similarly "strongly advocated" certain positions regarding a core issue in this arbitration by directing your counsel to argue that you may delegate your exclusive conduct detrimental authority. Moreover, you would be arbitrating the union's claim that you affirmatively violated the CBA by delegating your authority to Mr. Vincent. Accordingly, like Commissioner Tagliabue in *Morris*, you are demonstrably evidently partial with respect to this issue and may not serve as arbitrator over Mr. Brady's appeal.

II. You Cannot Lawfully Arbitrate A Hearing In Which You Are A Central Witness

Your role as a necessary fact witness in this proceeding also mandates recusal. It would defy the LMRA, the FAA, any and all notions of fundamental fairness and industrial process, and create a circus-like arbitral proceeding if you were to arbitrate a hearing in which you were also called upon to testify (would you assess your own credibility? would you rule on your own counsel's objections?) There also will be document requests for league files and files underlying the Wells investigation that will relate to your involvement in these matters. How can you, as an evidently partial arbitrator on these issues, rule on such important matters?

As set forth above, your decision to delegate your exclusive authority to Mr. Vincent necessarily makes your testimony essential to Mr. Brady's appeal to determine the facts relating

to this purported delegation. This circumstance alone renders you evidently partial and thus unfit to preside as arbitrator over Mr. Brady's appeal.

Your testimony is also necessary regarding your knowledge of the events leading up to the AFC Championship Game. Whether the NFL conducted a "sting operation" to try to entrap Mr. Brady and the Patriots—and your knowledge and direction of any such operation—is another issue in this appeal. *See* May 14, 2015 Notice of Arbitration Appeal of Tom Brady at 2.

In addition, you will be called upon to testify about your historical choices not to punish teams and players for alleged violations similar to those at issue in Mr. Brady's appeal. For instance, you imposed no penalty for a ball-warming incident that occurred in 2014 during a game between the Minnesota Vikings and Carolina Panthers, and you imposed only a $20,000 fine for a 2012 incident wherein the San Diego Chargers allegedly used a towel with an illegal substance to doctor game equipment. Your completely unprecedented and inconsistent punishment of Mr. Brady—and what motivated it—are squarely at issue in the arbitration and mandate your testimony.

As in *Rice*, where Judge Jones compelled your testimony under the CBA to afford Mr. Rice a fundamentally fair hearing (and ultimately vacated your discipline), your status as a witness requires the appointment of a neutral arbitrator who is not connected to the NFL.

III. You Cannot Lawfully Arbitrate Issues Which You Have Publicly Prejudged

Your evident partiality is further (and independently) established by your public statements concerning the Wells investigation into alleged NFL Rules violations by members of the New England Patriots—both following the release of the Wells Investigative Report ("Wells Report" or "Report") and after Mr. Brady's discipline was imposed.

The NFLPA and Mr. Brady will challenge the findings and conclusions of the Wells Report. *See* May 14, 2015 Notice of Arbitration Appeal of Tom Brady at 2. But you have already publicly vouched for this work, for which the NFL apparently paid "millions of dollars" to commission.[1] For example, following the release of the Wells Report on May 6, 2015, you took to the media to praise Mr. Wells, the Report, and its conclusions, stating:

> I want to express my appreciation to Ted Wells and his colleagues for performing a *thorough* and *independent* investigation, the findings and conclusions of which are set forth in today's comprehensive report.[2]

The NFLPA and Mr. Brady will also challenge the discipline imposed by Mr. Vincent as wildly disproportionate to, and not fair and consistent with, the NFL's treatment of prior, alleged conduct of a similar nature. But you have already publicly vouched for the level of discipline imposed by Mr. Vincent:

> We reached these [disciplinary] decisions after extensive discussion with Troy Vincent and many others . . . [w]e relied on the critical importance of protecting the integrity of the game and the thoroughness and independence of the Wells report.[3]

Such public comments might be in line with your role as *Commissioner*, but they are totally inappropriate for a person who intends to serve as *arbitrator*. Your public statements

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[1] Mark Maske, *NFL Investigator Ted Wells Says It's "Wrong to Criticize My Independence" in DeflateGate Report*, WASH. POST, May 12, 2015, http://www.washingtonpost.com/news/sports/wp/2015/05/12/nfl-investigator-ted-wells-says-its-wrong-to-criticize-my-independence-in-deflategate-report/ ("Wells did not specify exactly what his bill to the NFL for his investigation will be but said there is 'no question it's in the millions of dollars.'").

[2] Gregg Rosenthal, *Wells Report Released on Footballs Used in AFC Title*, NFL.COM, May 6, 2015, http://www.nfl.com/news/story/0ap3000000491385/printable/wells-report-released-on-footballs-used-in-afc-title (emphasis added).

[3] *NFL Releases Statement on Patriots' Violations*, NFL.COM, May 11, 2015, http://www.nfl.com/news/story/0ap3000000492190/article/nfl-releases-statement-on-patriots-violations (emphasis added).

about Mr. Wells's findings being "thorough" and "independent" have effectively boxed in your capacity to reach any contrary conclusions in the course of arbitrating Mr. Brady's appeal. Compounding the problem, Mr. Wells serves as outside counsel for the NFL and has apparently been paid millions of dollars for his work on this Report; thus, in order to find that the Wells Report is deficient in any respect you would have to criticize your own lawyer and commissioned Report, which you have already publicly praised. The problem is equally severe with respect to your public endorsement of the discipline imposed by Mr. Vincent—you would have to reverse your public statements and criticize Mr. Vincent's discipline in order to rule for Mr. Brady after you have publicly compromised yourself on this very issue. No objective observer could conclude that you are not evidently partial under these circumstances, which mirror those that led to the disqualification of Commissioner Tagliabue—and the appointment of a neutral arbitrator in his place—in *Morris*. 575 N.Y.S.2d 1013.

Indeed, similar circumstances led to your recusal in the New Orleans Saints players *Bounty* arbitration (where player discipline was ultimately vacated). There, as here, you publicly championed the findings and conclusions of the League's hired investigators and publicly endorsed the very discipline that was under appeal prior to the arbitral hearing. After the NFLPA filed a Petition to Vacate before the U.S. District Court for the Eastern District of Louisiana, you recognized that you could not lawfully serve as arbitrator, and recused yourself in favor of former Commissioner Tagliabue. Recusal is required again here.

IV. You Cannot Lawfully Arbitrate A Matter Implicating The Competence And Credibility Of NFL Staff

Finally, you are rendered evidently partial in this matter by virtue of the fact that the competence and credibility of NFL staff will be called into question. As the Wells Report makes clear, myriad League officials are fact witnesses to the events in question. *See* Wells Report at 24-27 (League witnesses interviewed by Paul, Weiss include Mr. Vincent; T. David Gardi, senior vice president of football operations; Akil Coad, director of football operations and compliance; James Daniel, director of game operations; Eric Kerzner, senior director of labor operations; Mike Kensil, vice president of football operations; Richard Farley, security representative for the New England Patriots; Jack Osborne, security representative for the Indianapolis Colts; John Raucci, director of investigative services; Dan Grossi, director of event security; Dean Blandino, vice president of officiating; Johnny Grier, northeast regional supervisor of officials; Alberto Riveron, senior director of officiating; and Milton Britton, kicking ball coordinator for Gillette Stadium). Precedent in Article 46 proceedings requires that the NFLPA and Mr. Brady have the opportunity to examine NFL investigators and executives with relevant information about the subject of the arbitration. *See Rice* Decision on Discovery and Hearing Witnesses, Oct. 22, 2014, at 2 (compelling your testimony and testimony of Ravens General Manager Ozzie Newsome, Ravens President Dick Cass, and NFL Chief Security Officer Jeffrey Miller); *see generally Bounty* hearing notices issued Nov. 2012 (compelling testimony of Mr. Vincent, Mr. Miller, Former Saints Coach Mike Cerullo, Former Saints Defensive Coordinator Gregg Williams, Saints Assistant Head Coach Joe Vitt, NFL Spokesman Greg Aiello, NFL Security Officer Joe Hummel, and NFL Security Officer Pat Foran). You cannot

satisfy the governing evident partiality test when it comes to hearing and evaluating the credibility of the testimony of your own subordinates. This, too, requires your recusal in this case.

CONCLUSION

For any and all of the foregoing reasons, the NFLPA and Mr. Brady respectfully request that you recuse yourself from arbitrating this matter. The NFLPA stands ready to confer with the League on the appointment of a neutral Hearing Officer in your place, as it did in the *Rice* proceeding.

Respectfully submitted,

Jeffrey L. Kessler

cc: Tom Brady
DeMaurice F. Smith, Esq.
Tom DePaso, Esq.
Heather M. McPhee, Esq.
Ned Ehrlich, Esq.
David Greenspan, Esq.
Jeff Pash, Esq.
Adolpho Birch, Esq.
Donald H. Yee, Esq.